

No. SC84714

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IN THE  
**SUPREME COURT OF MISSOURI**

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**STEVEN COX,**

Respondent,

v.

**DIRECTOR OF REVENUE,  
STATE OF MISSOURI,**

Appellant.

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Appeal from the Circuit Court of  
Miller County, Missouri,  
The Honorable Kenneth Oswald, Judge

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**APPELLANT'S SUBSTITUTE BRIEF**

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## **TABLE OF AUTHORITIES**

### **Cases**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a final judgment of the Circuit Court of Miller County, Missouri, the Honorable Kenneth Oswald, Judge. This appeal does not involve a felony exclusively punishable by death, and this appeal does not involve any of the matters assigned to this Court by Art. V, § 3 of the Missouri Constitution. Therefore, the Missouri Court of Appeals had jurisdiction of this appeal. This court has assumed jurisdiction by transfer, pursuant to Art. V, § 10.

## **STATEMENT OF FACTS**

An Eldon Police Department officer went to a parking lot at approximately 10:20 p.m. on August 15, 1998 to check on a vehicle that was running with no one apparently around (LF 29). The officer discovered Cox, either asleep or unconscious, in the driver's seat of the vehicle (LF 29). Because the vehicle was running, the officer checked to make sure the vehicle's shift lever was in "park" before attempting to wake Cox (LF 29).

When Cox awoke, he appeared to be very disoriented, and he had a strong odor of an intoxicating beverage on his breath (LF 29). The officer noticed that Cox had a glass that was approximately 3/4 full of a brown liquid sitting between his legs, and that Cox's eyes were bloodshot and watery (LF 29).

The officer had Cox turn off the vehicle and get out to perform some field sobriety tests (LF 29). Cox displayed no smooth pursuit and distinct nystagmus at maximum deviation, with onset at 25 degrees on the "gaze nystagmus" test, and he could not complete either the "walk-and-turn" or "one leg stand" tests (LF 18, 29).

The officer arrested Cox for driving while intoxicated, then transported



Cox the police station (LF 29). A subsequent breath test revealed a blood alcohol content of .18 (LF 20, 27, 29).

The Director suspended Cox's driving privilege pursuant to ' 302.500, *et seq.* RSMo 1994 and RSMo Supp. 1997. Cox filed a petition for trial de novo in the circuit court for Miller County (LF 1-3). The cause was submitted on the Director's records, subject to Cox's objection that the records were inadmissible for lack of probable cause for the arrest (LF 46).

The circuit court allowed the parties to provide post-submission authority for their positions (LF 46). Cox submitted a memorandum asserting that he had not been observed "driving" by the officer (LF 34). On September 13, 2000, the Honorable Kenneth Oswald entered a judgment finding that the Director had failed to meet her burden of proof (LF 43). On October 23, 2000, the Director filed a timely notice of appeal.

## POINT RELIED ON

**The circuit court erred in setting aside the suspension of respondent Cox's driving privilege on the basis that the Director had not borne her burden of proof because the Director had borne her burden by making a *prima facie* case under ' 302.505, RSMo 2000, in that the director introduced records demonstrating that the arresting officer had probable cause to believe that Cox had operated a motor vehicle while intoxicated, *i.e.*, records that showed the arresting officer observed Cox in the driver's seat of the vehicle, with the doors closed and no one else around, and the engine running.**

*Baptist v. Director of Revenue*, 971 S.W.2d 366 (Mo.Ct.App. ED 1998)

*Hoyt v. Director of Revenue*, 37 S.W.3d 356 (Mo.Ct.App. WD 2000)

*State v. Cross*, 34 S.W.3d 175 (Mo.Ct.App. WD 2000)

*State v. Wiles*, 26 S.W.3d 436 (Mo.Ct.App. SD 2000)

' 302.505, RSMo 2000

' 577.001, RSMo 2000

## ARGUMENT

**The circuit court erred in setting aside the suspension of respondent Cox's driving privilege on the basis that the Director had not borne her burden of proof because the Director had borne her burden by making a *prima facie* case under ' 302.505, RSMo. 2000, in that the director introduced records demonstrating that the arresting officer had probable cause to believe that Cox had operated a motor vehicle while intoxicated, *i.e.*, records that showed the arresting officer observed Cox in the driver's seat of the vehicle, with the doors closed and no one else around, and the engine running.**

### **A. Introduction**

To successfully defend her suspension of Cox's license, the Director was required to establish that the officer arrested Cox, that he had probable cause to arrest Cox for "driving while intoxicated," and that Cox's blood alcohol concentration equaled or exceeded the statutory limit set forth in ' 302.505, RSMo. *Stewart v. Director of Revenue*, 702 S.W.2d 472, 475 (Mo. banc 1986). The "driving while intoxicated" for which a person can be arrested is defined in ' 577.010 as "operat[ing] a motor vehicle while in an intoxicated or drugged condition." "Operate" is, in turn, defined in ' 577.001: "[T]he term

'drive', 'driving', 'operates' or 'operating' means physically driving or operating a motor vehicle." Under ' 302.505, then, the Director is to revoke or suspend a driver's license when that person is arrested, on probable cause, for operating a motor vehicle while intoxicated.

Cox does not contest that he was arrested (LF 20). Nor does he contest that he was intoxicated -- a fact that was established by his blood alcohol content of .18, well above the legal limit (*see* LF 20, 27, 29, and Respondent's Brief at 2). Cox does not even dispute the facts relating to whether the officer had probable cause to arrest him for driving while intoxicated.

Instead, Cox disputes whether the officer, under those facts, had probable cause to arrest him for driving while intoxicated (*see* LF 34-35). The circuit court concluded that the Director did not meet her burden of proof (LF 46), apparently because no one reported seeing Cox "drive" the vehicle. That finding is unsupported by the evidence. Cox made one argument in support of that position, and presumably now that he is before a court that is not bound by Missouri Court of Appeals, Western District precedent, will add another here. The court should reverse the circuit court's holding and reject Cox's theories to support it.

## **B. Standard of Review**

In reviewing a court-tried case, this court sustains the judgment of the court below unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

## **C. That Cox was in the driver's seat, with the door closed, the engine running, and no other possible drivers nearby, was enough to give the officer probable cause to believe that Cox had operated the vehicle.**

The key question here, according to the dissent in the court of appeals, is whether what Cox was doing constituted "driving." In the court of appeals, Cox could not argue effectively to the contrary, for the facts were essentially indistinguishable from those in a prior Western District case, *State v. Cross*, 34 S.W.3d 175 (Mo.Ct.App. WD 2000).

The facts on which the officer found probable cause (*see* LF 29-30) here were undisputed. Officer Upton found the vehicle with its engine running and its transmission in park. When he walked up to the driver's side of the car, he saw Cox sitting in the driver's seat, either sleeping or unconscious. By knocking on the window, he woke up Cox, who was disoriented. The officer

noticed a strong smell of alcohol on Cox's breath and a glass, three-quarters full of a brown liquid, sitting between Cox's legs. Officer Upton shone his flashlight on Cox and saw that Cox's eyes were very bloodshot and watery. Officer Upton then asked Cox to shut off the car's ignition and get out of the car; Cox complied.

Officer Upton attempted to administer three field sobriety tests. Cox's performance on the horizontal gaze nystagmus test indicated that he was intoxicated. Cox was unable to perform the one-leg stand and the walk-and-turn tests. Officer Upton then arrested Cox for driving while intoxicated.

The court of appeals merely applied established law to those facts. Though that law was established by the court of appeals and not by this court, this court should follow it.

The prevailing rule is derived from reading the plain language of ' 577.001. The dissenting argument is derived from a combination of the past and present language of ' 577.001 and phrases extracted from cases decided under the prior language. But in both approaches, the key issue is differentiating among three terms: "drive," "operate," and "actual physical control." The statute now defines "driving," for purposes of "driving while intoxicated" (' 577.010) or "driving with excessive blood alcohol content" ('

577.020), as "physically driving or operating a motor vehicle." ' 577.001.1, RSMo 2000. Until 1996, the definition was broader; it defined "driving" as "physically driving or operating or being in actual physical control of a motor vehicle." ' 577.001.1, RSMo 1994. So "driving" included three different things: "driving," "operating," and "being in actual physical control." Now it only includes two. The question on which the judges of the Court of Appeals, Western District, have twice been divided is what "operating" now means.

The relationship among the three terms was graphically set out by the Western District in *State v. Cross*. They are like three concentric circles, for "an individual who drives a motor vehicle is also operating it and in actual physical control of it." 34 S.W.3d at 182.